

Maryland Law Review

Volume 21 | Issue 1

Article 3

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Recommended Citation

Robert Whitman, *Incorporation by Reference in Commercial Contracts*, 21 Md. L. Rev. 1 (1961)

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Maryland Law Review

VOLUME XXI

WINTER, 1961

NUMBER 1

INCORPORATION BY REFERENCE IN COMMERCIAL CONTRACTS

*By Robert Whitman**

INTRODUCTION

To complement the explosive development of modern business the use of commercial contracts has greatly expanded, and these documents have grown into intricate, detailed, hypertechnical expositions.¹ The doctrine of incorporation by reference alleviates this complexity by allowing a reference to incorporate into the agreement extrinsic materials which are given equal weight with provisions directly contained therein.² Parties utilizing such an incorporation may have the advantages of (1) speed and efficiency in the drawing of contracts; (2) stereotyped clauses which can be applied on innumerable occasions to achieve uniformity; (3) greater skill and care in the drafting of clauses to be incorporated, producing in turn, a clearer and more complete statement of intent; (4) certainty as to meaning and effect of incorporated terms after an initial construction by the courts; and (5) retention of the basic provisions of the contract in convenient form.

On the other hand, employment of an incorporation by reference has the potential of causing undesirable results. A court can misinterpret an ambiguous or inadequate state-

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¹ In general this work is confined to a consideration of incorporation of written material into a written contract. The doctrine of incorporation by reference is not so limited. As long as the statute of frauds is not violated an oral or written contract can validly incorporate an oral or written reference. See *Womble v. Hickson*, 91 Ark. 286, 121 S.W. 401 (1909) (house to be built as duplicate of another); *American Mercantile Exchange v. Blunt*, 120 Me. 128, 66 A. 212 (1906) (written contract referring to a "system" which was orally explained); *American Barge Line Co. v. Jones & Laughlin Steel Corp.*, 179 Tenn. 156, 163 S.W. 2d 502, 505 (1942) (oral contract referred to "the usual and customary arrangement" which was explained orally). *Of. Annotation*, 73 A.L.R. 1383 (1931).

² *E.g.*, *Enochs v. Christie*, 137 Cal. App. 2d 887, 291 P. 2d 200 (1955); *Stanley v. New*, 56 N.M. 756, 250 P. 2d 893 (1952).

ment as the reflection of either the presence or absence of an intent to incorporate, or the desired scope of the reference may be misconstrued. An indiscriminate use of incorporation may create conflicts between contract provisions. Finally, incorporation discourages careful scrutiny of all the contract's terms with a consequent unequal advantage for one of the contracting parties.

Regardless of this formidable list of undesirable circumstances which may stem from incorporation, the doctrine's use will undoubtedly continue to thrive. How, then, can a draftsman utilize the advantages of a reference while minimizing its adverse effects? How will these incorporations be treated by the courts?

The difficulties brought before the court when a reference is at issue arise from the assertion of conflicting intents by the contracting parties. While a court is likely to lean towards a ruling which will uphold the parties' agreement if the existence of the disputed incorporation is essential to the finding of a contract which was intended,³ it must also attempt to avoid allowing a party to obtain an unfair advantage by employing a reference. In judging each case the court will be applying both the general rules of contract law and those rules dealing particularly with the doctrine of incorporation by reference. So, the court may have several theories to choose from in order to reach a desirable decision when it faces the major problem areas of incorporation which are considered below.

MANIFESTATION OF INTENT

When the meaning of the words adopted by the parties is disputed, the intent of the contractors at the time they entered into their agreement is sought by the court.

1. *Intent to Incorporate*

No specific language is necessary to bring about an incorporation by reference, but if the parties do not expressly demonstrate an intent to incorporate in the body of the contract,⁴ they will place upon the court the burden

³Presumably the expressions of the parties would be interpreted *ut res magis valeat*. In an overwhelming number of cases where reference materials are in issue, however, their contents are not essential to the finding of a contract.

⁴If a writing recites that it is part of another agreement which makes no mention of incorporation, an incorporation may not be found since the preliminary question of intent should be answered from the body of the contract itself. *Spence v. Central Acc. Ins. Co.*, 236 Ill. 444, 86 N.E. 104 (1908) (application for insurance not incorporated into policy). See

of validating their desired incorporation by finding an implied intent.⁵ A clear manifestation of an intention to incorporate, (e.g., "This contract is subject to [description of incorporated material] which by reference is incorporated as a part of this agreement,")⁶ will eliminate any doubt as to the intent of the parties. But often statements of intent are vague and ambiguous, and must then be construed by the court.⁷

In construing such statements courts consider the nature of the transaction involved. In a contract between a subcontractor and a general contractor, a presumption prevails that the subcontractor undertakes to do his work subject to the conditions and limitations in the agreement between the principal contractor and the owner. Consequently, little evidence is required to find an incorporation of the terms of a general contract in a sub-contract.⁸ Conversely, in different situations it has been said that to find that the terms of another document were intended to be incorporated into an agreement, a reference must be clear and unequivocal.⁹

While a court's decision depends upon the facts of the particular case, there are several principles which can be considered in determining intent. A finding of incorporation is bolstered by the fact that the incorporated materials supplement and enhance the meaning of incomplete contract terms, rather than conflict with complete provisions.¹⁰

also *American Employers Ins. Co. v. Raton Wholesale Liquor Co.*, 123 F. 2d 283 (10th Cir. 1941) (application for fidelity bonds); *Sohn v. New York Indemnity Co.*, 340 Ill. 129, 172 N.E. 57 (1930) (insurance application). But where the court regards a contract as ambiguous such a reference would make it easier to find an intent to incorporate. See text at note 20, *infra*.

⁵ If a reference is not found, under the parol evidence rule the extrinsic materials which bear on the contract would not be admissible as evidence if they varied or modified the contract. *E.g.*, *Brown-Randolph Co. v. Gude*, 151 Ga. 281, 106 S.E. 161 (1921).

⁶ *E.g.*, *Valley Construc. Co. v. City of Calistoga*, 72 Cal. App. 2d 839, 165 P. 2d 521 (1946); *Level Export Corp. v. Wolz, Aiken Co.*, 305 N.Y. 82, 111 N.E. 2d 218 (1953), rev'g. 280 App. Div. 211, 112 N.Y.S. 2d 549 (1952).

⁷ See *United States Rubber Products v. Clark*, 145 Fla. 631, 200 So. 385 (1941) (lack of sufficient description); *Brown-Randolph v. Gude*, 151 Ga. 281, 106 S.E. 161 (1921). Compare *Spence v. Central Acc. Ins. Co.*, 236 Ill. 444, 86 N.E. 104 (1908), with *Gaines v. Fidelity & Cas. Co. of N.Y.*, 188 N.Y. 411, 81 N.E. 169 (1907).

⁸ *E.g.*, *Granette Products Co. v. Arthur H. Neumann & Co.*, 200 Iowa 572, 203 N.W. 935 (1925); *Hartwell v. Friechneder*, 217 S.W. 231 (Tex. Civ. App. 1920).

⁹ *Scott's Valley Fruit Exchange v. Growers Refrigeration Co.*, 81 Cal. App. 2d 437, 184 P. 2d 183, 189 (1947). See *Cordle v. Sheaf*, 104 N.E. 2d 455 (Ct. App. Ohio 1950).

¹⁰ *Frierson v. International Agricultural Corp.*, 24 Tenn. App. 616, 148 S.W. 2d 27, 35 (1940).

An intent to incorporate is suggested if both the contract and the reference material were executed on the same day and drawn by the same parties.¹¹ Attachment of supplementary materials to the contract at its inception is also a strong indication that an incorporation was intended.¹²

When another contract is merely mentioned in an agreement, it is questionable whether there was an intent to incorporate. Is the citation to this other instrument for descriptive purposes only, or is there an intent to adopt its provisions and import them into the agreement? For example, a promissory note, otherwise negotiable, may be read as containing a provision making it subject to the terms of an extrinsic agreement which thereby renders it non-negotiable.¹³ Or, the same reference may be interpreted as merely indicating that an extrinsic contract was at the origin of the transaction which gave rise to the instrument, and this would not impair its negotiability.¹⁴

A vexing situation arises when an earlier contract is alluded to in a second agreement between the same parties.

In *Government Personnel Mut. Life Ins. Co. v. Wear*,¹⁵ Wear, a former employee of the insurance company, sued to recover commissions. After trial the court disregarded answers of the jury which were favorable to the insurance company and rendered judgment for the plaintiff. On appeal, the Court of Civil Appeals of Texas considered the three contracts involved which had all been executed on July 1, 1946.

Under contract No. 1, between Wear and the company, Wear was authorized to solicit insurance policies on a commission basis. Contract No. 3, between one Earl and the company, similarly authorized Earl to solicit insurance. Contract No. 2, between Wear and the company, was entitled "Supplemental Agreement" and provided in part that "the company agrees to pay Gordon Wear the following commission on (premiums paid for)"¹⁶ life insur-

¹¹ Lapp v. Loufek, 113 F. Supp. 65 (Minn. 1953).

¹² Associates Discount Corp. v. Greisinger, 103 F. Supp. 705 (W.D. Pa. 1952).

¹³ See Annotation, 104 A.L.R. 1378 (1936).

¹⁴ E.g., Strand Amusement Co. v. Fox, 205 Ala. 183, 87 So. 332 (1921) ("as per contract"); Cook v. Park, 47 Ga. App. 749, 169 S.E. 208 (1933); Tyler v. Whitney Central Trust & Savings Bank, 157 La. 249, 102 So. 325 (1924) ("as per lease"); Enoch v. Brandon, 249 N.Y. 263, 164 N.E. 45 (1928) (bonds refer to trust mortgage). See UNIFORM COMMERCIAL CODE (1958) § 3-105. But see, e.g., Allison v. Hollenbeak, 139 Iowa 479, 114 N.W. 1059 (1908) (payee agrees to look to mortgage security for payment); Sloan v. McCarty, 134 Mass. 245 (1883).

¹⁵ 247 S.W. 2d 284 (Tex. Civ. App. 1947).

¹⁶ The parties agreed that the words inserted parenthetically by the court were intended. *Id.*, 285.

ance contracts issued by said company on insurance written (solicited) by C. H. Earl under his contract dated July 1, 1946."¹⁷

One of the questions¹⁸ to be decided on appeal was the date contract No. 2 was terminated. It was the company's contention that it was ended by oral notice given to Wear in October 1947. Wear contended that the contract did not terminate until thirty days after written notice of cancellation was given to him on May 28, 1948.

Contract No. 2 did not contain a provision for written notice of termination, but it was argued that paragraph X of contract No. 1, which provided for termination only upon thirty days written notice, was incorporated into contract No. 2.¹⁹ In support of an incorporation by reference were the facts that contract No. 2 was styled a "Supplemental Agreement" and that contract No. 1 expressly provided in paragraph XVI that "this agreement, together with any amendments thereto duly executed constitutes the entire contract between the parties."²⁰

The majority of the court found contracts No. 1 and No. 2 to be separate and complete instruments which were in no way linked together. The trial court had concluded that they were one agreement, and the dissent, on appeal, was of the same opinion, finding that contract No. 1 looked forward to possible amendments and that it had been agreed that these would be considered a part of the original contract. Moreover, the dissent pointed out that contract No. 2 was not in conflict with any provisions of the prior contract but was rather a necessary complement of that instrument.²¹

The majority felt it was of little or no importance that the contracting parties had named contract No. 2 a "Supplemental Agreement" since the heading the parties agreed

¹⁷ *Supra*, n. 15, 285. The majority opinion gives no reason for the necessity of a "Supplemental Agreement." The dissenting opinion states, "The insurance company, for reasons of its own, did not want Earl to know that Wear was making money on Earl's services." *Id.*, 293.

¹⁸ A claim that Wear was entitled to recover commissions on policies solicited by subagents of Earl was unanimously rejected by the court on appeal.

¹⁹ Wear also contended that since the two contracts related to the same subject matter and were executed between the same parties on the same day, contract No. 2 should be read and construed together with contract No. 1. The Court assumed for argument that the contracts should be construed together but pointed out that this fact alone, without an incorporation by reference, would not justify placing a paragraph from No. 1 into No. 2. The dissent agreed with this analysis. See *supra*, n. 15, 286, 294.

²⁰ *Supra*, n. 15, 286.

²¹ *Id.*, 293.

upon was not a part of the contract, and the agreement did not indicate what it supplemented.²² The dissent logically queried what, if not the original agreement, could or did contract No. 2 supplement. It reasoned that the parties by a title selected by themselves showed contract No. 2 was to complete something that had gone before, and while the name the parties selected for the document could not control, there was no reason to render these words meaningless since they symbolized the ideas of the persons using them.²³

²² *Id.*, 287. The court further stated that "It is much more important what the instrument when read within its four corners provides than the name the parties who were not lawyers gave it."

²³ *Id.*, 293. The court next asserted that if contract No. 2 was to become a part of contract No. 1 and be governed by it, the parties would have so provided in their instrument. The dissent countered by arguing that the absence in the second agreement of clauses which had already been adequately settled evidenced an understanding that the two agreements were one. See note 89, *infra*.

The court concludes its argument on this issue by asserting that Wear is at most raising a question of fact which he has waived by failing to raise the issue of the intention of the parties. The dissent does not directly reply but apparently assumes that the question before the court is to be decided as a matter of law.

The majority of the court went on to justify its holding on an alternative ground. It said contract No. 2 provided that Wear was to have obtained commissions under Earl's contract dated July 1, 1946. Earl and the Company agreed to terminate their contract December 31, 1947, and operate under a new contract. Therefore, when Earl's contract of July 1, 1946, was terminated, Wear's rights to commissions on insurance thereafter written by Earl came to an end.

The dissent countered this argument by asserting that the change in Earl's contract could not work a corresponding change in Wear's contract where Wear had not agreed to it. Wear's contract provided for its complete cancellation on thirty days written notice and insofar as he was concerned it could only be terminated by such communication.

Nowell, J., in a concurring opinion rested his decision in favor of the company on the jury's decision that Wear was estopped from contending that his commissions did not end on January 1, 1948. Relying heavily upon *Humble Oil & Refining Company v. Harrison*, 146 Tex. 216, 205 S.W. 2d 355 (1947), Judge Nowell found that Wear did not protest nonpayments and that his conduct was calculated to and did lead the company to believe that he had acquiesced in its construction of the contract for it was only after Wear's connection with the company had ceased that he asserted his claim. This analysis was augmented by a finding that the provisions of the contract were ambiguous, so that parol evidence of the reasonable interpretation of the company could be admitted. *Supra*, n. 15, 289-92.

In reply to this estoppel argument the dissent claimed that Wear simply remained silent at a time when there was no duty to speak. The insurance company in effect only told Wear that some time in the future, when it sent written notice, a change would be made. Wear did not have to remind the company that its rights were controlled by a written contract. The dissent further agreed with the trial court, which, in disregarding the jury findings on estoppel, queried how Wear's later conduct could have put the company in an injurious position in making its earlier contract with Earl. At the earliest, Wear was orally notified in October, and by September the company had already arranged a new contract with Earl. *Id.*, 297.

The court in the *Wear* case seemed little inclined to allow *Wear* a recovery of close to five thousand dollars²⁴ because of a technicality. Still, if an incorporation by reference had been found, the contracts would have been considered as one, and the court would have had to base a denial of recovery on some general rule of contract law. Rather than resting upon such a general rule, the majority of the court chose to rely on the rule that an intent to incorporate must be found, backing this up with an alternative proposition.²⁵ It seems appropriate that the court emphasized the "intention to incorporate" problem, for the difficulty in the case arose from the fact that an executive of the insurance company responsible for giving notice of termination only read the "Supplemental Agreement" and did not then peruse contract No. 1.²⁶

2. *Matters Incorporated*

Along with an expressed intent to incorporate, the parties must clearly identify which materials they are incorporating,²⁷ how much of them are being referred to,²⁸ and the purpose for which the reference is made.²⁹

Regardless of size, virtually anything that can be written into a contract can be incorporated therein by reference.³⁰ Indeed, matters presently not in existence which could not be detailed in a contract, can be made a part of it by reference.³¹ Commercial contracts often incorporate trade association rules or the by-laws of a cor-

²⁴ *Supra*, n. 15, 289, 298.

²⁵ See note 23, *supra*.

²⁶ *Supra*, n. 15, 297.

²⁷ If it is found that the parties intended an incorporation, parol evidence as to which materials they meant to refer to can be submitted to make definite that which was indefinitely expressed. *E.g.*, *Helm v. Speith*, 298 Ky. 225, 182 S.W. 2d 635 (1944); *Love v. Damper*, 159 Miss. 430, 132 So. 439 (1931); *Le Marinel v. Bach*, 114 Wash. 651, 196 P. 22 (1921).

²⁸ See *Hill & Combs v. First National Bank of San Angelo*, 139 F. 2d 740 (5th Cir. 1944); *Berke Moore Co. Inc. v. Phoenix Bridge Co.*, 98 N.H. 261, 98 A. 2d 150 (1953).

²⁹ See *Helm v. Speith*, 298 Ky. 225, 82 S.W. 2d 635 (1944) (F.H.A. plans not only adopted for purpose of obtaining loan); *Rossi v. Douglas*, 203 Md. 190, 100 A. 2d 3 (1953) (plat not incorporated merely to indicate new buildings); *Alexander v. Fidelity & Casualty Co.*, 232 Miss. 629, 100 So. 2d 347 (1958) (subcontractor's incorporation of general contract did not include obligation to pay attorneys fees).

³⁰ But see note 71, *infra*. A simple contract cannot incorporate a specialty, 3 WILLISTON, CONTRACTS (Rev. Ed. 1936) § 628, 1802. *Cf. Huylers v. Ritz Carlton Restaurant & Hotel Co. of Atlantic City*, 1 F. 2d 491 (Del. 1924). For restrictions on incorporating by reference in a testamentary disposition, see, 6 POWELL, REAL PROPERTY (1958) § 627.

³¹ *Perry v. United States*, 146 F. 2d 398 (5th Cir. 1945) (plans and specifications); *Rossi v. Douglas*, 203 Md. 190, 100 A. 2d 3 (1953) (plat); *Kachurn v. Barr*, 272 App. Div. 391, 71 N.Y.S. 2d 629 (1947).

poration. If there is an incorporation of the specific rules in existence at the time of the making of a contract, those provisions will govern the rights of the parties regardless of a later amendment of the rules. It is just as easy, however, to incorporate the set of rules and any later changes that may be adopted.³²

If an incorporation is stated to be for a specified purpose, it will only become a part of the contract for that limited use.³³ But if extrinsic documents are referred to without limiting words, in the absence of evidence of a contrary intent, it will be presumed that the parties meant to incorporate all these materials without restriction.³⁴ Certainly, if by their reference the parties intend to limit express provisions of the contract or extend the scope of the contract into areas which are not covered within its body, this desire must be made obvious,³⁵ for if a segment of the main contract settles a particular issue, reference material generally referred to will not normally be considered applicable to change that provision.³⁶

In *Lusk v. Lyon Metal Products Inc.*,³⁷ Lusk sued Lyon for commissions allegedly due under a written contract. The trial court initially directed a verdict for plaintiff but thereafter, on defendant's motion, set aside that judgment and alternatively ordered entry of judgment for defendant or a new trial.

The agreement between the parties read in part as follows:

"Memorandum Governing Sales Upon Commission.

* * *

³² *Pacific Vegetable Oil Corp. v. C.S.T. Ltd.*, 29 Cal. 2d 228, 174 P. 2d 441 (1946). See *United Gas Pipe Line Co. v. Memphis Light, Gas & Water Division*, 358 U.S. 103, rehearing den. 358 U.S. 942 (1958). *Of* Annotation, 33 A.L.R. 2d 1118, 1128 (1954).

³³ *E.g.*, *Guerini Stone Co. v. P. J. Carlin Construction Co.*, 240 U.S. 264 (1915); *Pittsburgh Plate Glass Co. v. American Surety Co.*, 66 Ga. 805, 19 S.E. 2d 357 (1942).

³⁴ See *Frommeyer v. L. R. Construction Co.*, 261 F. 2d 879 (3rd Cir. 1958). Even where a reference for general purposes is found, incorporated materials merely suggesting a course of action will not be given effect in the absence of a specific election to make such provisions mandatory. *C. G. Trading Corporation v. Sun-Fast Textiles Inc.*, 201 N.Y.S. 883 (Sup. Ct. 1960).

³⁵ *Inland Engineering & Const. Co. v. Maryland Cas. Co.*, 76 Utah 435, 290 P. 367, 375 (1930).

³⁶ *Perry v. United States*, 146 F. 2d 398 (5th Cir. 1945); *Wilson v. Keefe*, 150 Cal. App. 2d 178, 309 P. 2d 516 (1957); *Krause v. Oscar Daniels Co.*, 61 Ohio App. 337, 22 N.E. 2d 544 (1939).

³⁷ 247 S.W. 2d 617 (Sup. Ct. Mo. 1952).

Products as follows: All products covered in the Steel Equipment Division Price, Policy and Procedure Book. * * *

Commission — Rates as set out in the Company Manual hereinafter referred to.

The Company will lend its Manual containing price, policy and procedure data, also current rates of commissions. Notice of changes in such Manual will be sent from time to time as the Company may determine. This Manual shall be returned immediately upon request of the Company or upon the termination of this appointment."³⁸

The orders plaintiff secured under this agreement were accepted by the company but were later cancelled by the purchasers and did not result in sales for the defendant. Section 9 of the Company Manual disallowed commissions on cancelled orders by providing that commissions were to be credited when orders were shipped subject to deduction if goods were returned.

On appeal by plaintiff the issue submitted was whether or not this provision of defendant's Manual had been incorporated within the agreement between the parties. Plaintiff argued for a limited incorporation; i.e., that the amount of plaintiff's commissions under the contract provisions was to be calculated in accordance with Section 8 of the Company Manual, entitled "Commission Rates." The court noted that the memorandum did not expressly provide that the provisions of the contract should be governed and controlled at all times by the Manual, yet it still found that all of the provisions of the Manual had been incorporated into the agreement.³⁹ The court questioned why the defendant was to "lend" its entire Manual to the plaintiff unless the parties meant to be bound by its provisions.⁴⁰ It also reasoned that the wide variety of questions which would arise under the contract would not be covered by the short memorandum but would be answered by the Company Manual and that this showed an intent to have all the Manual's provisions clarify the language of and define the terms used in the memorandum.⁴¹

The Court in the *Lusk* case did not have a general rule of contracts which it could have alternatively applied to

³⁸ *Id.*, 618.

³⁹ *Id.*, 621.

⁴⁰ *Id.*, 621.

⁴¹ *Id.*, 622.

the facts of the case in order to reach its decision. The sole question before the court was the scope of the reference intended by the parties. By viewing the overall circumstances surrounding the transactions between the parties and refusing to read the clause of the contract in isolation, the court was able to find an entire incorporation of the Manual for general purposes although an explicit intention to obtain this result was totally absent from the contract.

In *State v. Black*,⁴² plaintiff entered into an employment contract with the Board of Education of Mount Pleasant Special School District. The contract provided in Section 3 that her salary was to be paid monthly; in Section 4 that she agreed to "observe and enforce" the school laws of the state of Delaware, the Rules and Regulations of the State Board of Education and the Mount Pleasant Special School District;⁴³ and in Section 5 that either party could terminate the contract by giving thirty days' written notice. Plaintiff resigned her teaching position after three months and failed to receive payment of full salary for her last month of teaching. Defendant argued that upon the giving of notice of resignation, plaintiff's contract was converted from an agreement to pay compensation on a monthly basis to a *per diem* basis. Under the terms of the Rules and Regulations of the State Board of Education, employees paid on a *per diem* basis were not entitled to compensation when school was not in session because of construction repairs and Christmas vacation.

On appeal from a decision in favor of defendant, the court found that the contract, clearly requiring compensation by the month, did not incorporate the general Rules and Regulations for the purpose of abridging its terms. The words "observe and enforce" merely connoted an agreement by the teacher to abide by all regulations bearing on the conduct of a school teacher in the execution of her duties.⁴⁴

The court was impressed with the fact that the salary agreement had already been clearly set forth in the contract itself.⁴⁵ Applying the doctrine of incorporation by reference here would be "rather harsh" since at the signing of the agreement plaintiff, who was unversed in affairs of business, was handed a pamphlet containing the

⁴² 46 Del. (7 Terry) 295, 83 A. 2d 678 (1951).

⁴³ *Id.*, 679-80.

⁴⁴ *Id.*, 681.

⁴⁵ *Id.*, 682.

Rules of the School District but not those of the State Board of Education.⁴⁶ Plaintiff virtually conceded defeat if the Rules and Regulations of the State Board had been generally incorporated.⁴⁷ To avoid applying the reference material in this case the court could find a total absence of an incorporation by reference, or it could find that the incorporation was for a limited purpose only. By assuming "without deciding, that the words 'observe and enforce' clearly demonstrate an intention to incorporate by reference,"⁴⁸ it chose to rest its decision upon the latter theory.

3. *Conflicting Clauses*

Where materials incorporated into the contract are repugnant to provisions in the body of the instrument, which provisions did the parties intend to be controlling? It would be wrong to state as a rule that the provisions in the main instrument control. For one thing, in many reference situations there is no one document which can be termed the "main" contract which refers to an extrinsic source.

If a note is executed together with a mortgage, each instrument is likely to refer to the other. Here the note is said to be the primary evidence of the obligation, and so it overrides provisions in direct conflict within the mortgage.⁴⁹ In the absence of analogous reasoning which will enable a court to state such a broad rule, all of the materials involved are construed as a whole. A court looks for a way to reconcile the seemingly repugnant provisions, or, if this cannot be done, to determine which one of the provisions should be made effective in order to carry out the primary intention of the parties.⁵⁰

If an inconsistency lies between a clause that is broadly inclusive and one that is limited, the more specific clause will normally be held to modify the general statement, for the intention of the parties is likely to be found in the clause which particularly deals with the issue.⁵¹ And whether

⁴⁶ *Id.*, 681.

⁴⁷ *Id.*, 680.

⁴⁸ *Id.*, 681.

⁴⁹ Annotation, *Conflict Between Provisions of Note and Conditional Sale Instrument in Connection With Which Note is Given*, 143, A.L.R. 591 (1943). But cf. 6 Md. CODE (1957) Art. 66, § 26. See also Annotation, *Inconsistency Between Description of Land in Instruments Conveying Same or Affecting Title Thereto and Description in Another Instrument Referred to Therein*, 134 A.L.R. 1041 (1941).

⁵⁰ *E.g.*, *Arrow Sheet Metal Works v. Byrant & Detwiler Co.*, 338 Mich. 68, 61 N.W. 2d 125 (1953); *Idalou Cooperative Cotton Gin v. Gue*, 317 S.W. 2d 240, 246 (Tex. Civ. App. 1958).

⁵¹ *E.g.*, *Perry v. Bushwell*, 113 Me. 399, 94 A. 483 (1915); *Birnbaum v. Jamestown Mut. Ins. Co.*, 298 N.Y. 305, 83 N.E. 2d 128 (1948).

it appears in the main body of the contract or in a reference, a conflicting subsidiary provision is not interpreted as overriding the "dominant purpose" of the contract. In an English case where an oil tanker was chartered and the bill of lading was subject to the provisions of the "Carriage of Goods by Sea Act of the United States," and Section 5 of the Act made it inapplicable to charter parties, the House of Lords held that the parties effectively intended to incorporate the provisions of the United States Act into their contract. The restrictive language in Section 5 was rejected as meaningless.⁵²

When a statutory provision is incorporated into a contract, it will prevail over a conflicting provision of the contract if that construction will accomplish the purpose the law was intended to serve.⁵³ By deciding to incorporate a statute into the contract, the parties make its words their own. If evidence is presented that the parties understood the effect of the words to be different from that intended by the men who drafted them, the interpretation which the parties adopted would govern. But if a legislature specified that the provision should be included in every contract of a particular class, such a statute would be prescribing its legal operation and would have to be given effect in accordance with the intention of the legislature regardless of how the parties understood it.⁵⁴

It can be seen that in dealing with conflicts that arise when a reference has been made, general contract rules are applied and the presence of an incorporation is only one factor which the courts will consider.

ADEQUACY OF DISCLOSURE

Along with, or in place of disputing the meaning of words used within the contract, a party may attack a reference by claiming that he had never been shown nor been made aware of the contents of the incorporated materials.

General contract law provides that in the absence of misrepresentation a party is held to the terms of a con-

⁵² *Adamastos Shipping Co., Ltd. v. Anglo-Saxon Petroleum Co., Ltd.*, [1958] 2 W.L.R. 688, noted *Journal of Bus. Law* 139, 143 (1959).

⁵³ *Board of School Com'rs. v. Hahn*, 246 Ala. 662, 22 So. 2d 91 (1945); *Hipp v. Prudential Casualty & Surety Co.*, 60 S.D. 300, 244 N.W. 346 (1932); *Jones v. Preferred Acc. Ins. Co.*, 226 Wis. 423, 275 N.W. 897 (1937). See *UNIFORM COMMERCIAL CODE* (1958) § 2-318.

⁵⁴ *Lloyd v. Cincinnati Checker Cab Co.*, 67 Ohio App. 89, 36 N.E. 2d 67 (1941).

tract into which he has entered whether he has read them or not.⁵⁵ And generally, incorporated materials need not be signed by the parties⁵⁶ or annexed to the incorporating document⁵⁷ to become part of the contract. In fact, where a written contract expressly recites that a copy of incorporated materials is to be annexed⁵⁸ or signed by a party,⁵⁹ an omission to carry out the recital would not invalidate the reference if one of the parties had not been prejudiced. Even the failure to prepare materials which were to have been annexed to the contract has been held immaterial where the contract contains a sufficient amount of data within its body to govern equitably the rights of the parties.⁶⁰

The combined effect of these rules would render valueless the plea that a party failed to see or know the contents of the extraneous documents under consideration. Adoption of this rationale has given effect to incorporated provisions which contained arbitration clauses,⁶¹ time schedules for completing work,⁶² financing arrangements,⁶³ building requirements,⁶⁴ short statutes of limitations,⁶⁵ and limitations of liability.⁶⁶

⁵⁵ 3 CORBIN, CONTRACTS (1960) § 607, 656. See, e.g., *Bowser v. Hamilton Glass Co.*, 207 F. 2d 341 (7th Cir. 1953); *Re Estate of Holtorf*, 224 Minn. 220, 28 N.W. 2d 155, 157 (1947).

⁵⁶ *White v. McLaren*, 151 Mass. 553, 24 N.E. 911 (1890).

⁵⁷ E.g., *United States v. Outer Harbor Dock & Warf. Co.*, 124 F. Supp. 337 (Cal. 1954); *Ray v. William G. Eurice & Bros.*, 201 Md. 115, 93 A. 2d 272 (1952).

⁵⁸ *New England Iron Co. v. Gilbert El. R. Co.*, 91 N.Y. 153, 164-65 (1893); *Goddard v. Morgan*, 193 Wash. 83, 74 P. 2d 894 (1937). See *Boyd v. Miller*, 210 Iowa 829, 230 N.W. 851 (1930); *Bowers v. Ocean Accf. & Guarantee Corp.*, 110 App. Div. 691, 97 N.Y.S. 485 (1906), *aff'd*, 187 N.Y. 561, 80 N.E. 1105 (1907). *Of. Billet v. Penn. Fire Ins. Co.*, 101 N.J.L. 546, 129 A. 209, 211-12 (1925) (waiver of attachment by insurance company).

⁵⁹ *Lennon v. Smith*, 14 Daly 520, 1 N.Y.S. 520 (1888) (party stated signing stipulated by contract was unnecessary).

⁶⁰ *Womble v. Hickson*, 91 Ark. 266, 121 S.W. 401 (1909).

⁶¹ *Level Export Corp. v. Wolz, Aiken & Co.*, 305 N.Y. 82, 111 N.E. 2d 218 (1953), *rev'g*, 280 App. Div. 211, 112 N.Y.S. 2d 549 (1952) (contents of incorporated material not known of, and not seen).

⁶² *Spitcaufsky v. State Highway Commission of Missouri*, 349 Mo. 117, 159 S.W. 2d 647 (1942) ("weighted tables" on file in commissions office not seen by plaintiff).

⁶³ *Trottier v. M. H. Golden Const. Co.*, 105 Cal. 2d 347, 233 P. 2d 675 (1951).

⁶⁴ *Helm v. Speith*, 298 Ky. 225, 182 S.W. 2d 635, 637 (1944).

⁶⁵ *Jones v. Cunard S.S. Co. Ltd.*, 238 App. Div. 172, 263 N.Y.S. 769 (1933).

⁶⁶ *Conner v. Manchester Assur. Co.*, 130 F. 743, (9th Cir. 1904) (insurance policy). *Greenspon-Newman Inc. v. Cunard*, 227 App. Div. 737, 236 N.Y.S. 809 (1929), as reported in *Jones v. Cunard S.S. Co. Ltd.*, 238 App. Div. 172, 263 N.Y.S. 769 (1933).

1. Attachment Required

In special situations, the pressure for disclosure of incorporated materials has caused the requirement of attachment of the incorporated matters to the body of the contract to be imposed to facilitate their examination.⁶⁷

A chattel mortgage is publicly recorded to serve constructive notice of the lien on other creditors. The instrument recorded is to include a description of the property encompassed by the mortgage so that third parties will be able to identify the goods under the mortgage lien. While a schedule of chattels can be incorporated into a mortgage by mere reference, to satisfy the requirements for effective recordation it must be on file,⁶⁸ although it need not be attached to the mortgage.⁶⁹

When contracting parties are originally in an unequal bargaining situation, the requirement of attachment may be imposed in an attempt to avoid an exaggeration of their status.

To protect owners of insurance from the insurers' practice of incorporating by reference ambiguous and misleading clauses containing exceptions and conditions which are unreasonable and deceptively affect the risk taken by the insurer, state statutes commonly require that all the terms of the insurance contract be plainly expressed within the policy.⁷⁰ These statutes may disallow incorporation by reference of any material provisions,⁷¹ or they may

⁶⁷ If an attachment is required how secure must it be? It is doubtful whether a rider to an insurance policy can merely be folded in with the policy. See *Pawson v. Barnevelt*, 1 Doug. 12, note 4 (1779). Where a statute requires a signature or statement to be on the instrument the general rule is that the validity of an attachment to the document depends on whether it was so securely affixed that removal would result in the mutilation of the instrument or leave behind sufficient evidence that the instrument had been tampered with. Compare *Raeuber v. Central Nat. Bank*, 112 F. Supp. 865 (N.D. Ohio E.D. 1953), with *In re Chinese Temple Restaurant*, 54 F. 2d 945 (D.C. Cir. 1931). Compare OHIO GEN. CODE (1910) § 8564 ("instrument . . . must state thereon"), with 13 BALDWIN'S OHIO REV. CODE (1958) § 1319.04 ("Sworn statement placed thereon or attached thereto").

⁶⁸ *Raeuber v. Central Nat. Bank*, 112 F. Supp. 865 (N.D. Ohio E.D. 1953).

⁶⁹ *Commodity Credit Corporation v. Wells*, 188 Ga. 287, 3 S.E. 2d 642, followed in 188 Ga. 434, 4 S.E. 2d 243 (1939) (reference to prior mortgage which was on record); *Slimmer v. Meade County Bank*, 34 S.D. 147, 147 N.W. 734 (1914).

⁷⁰ See 1 COUCH, INSURANCE (1959), § 3:19, 141.

⁷¹ *E.g.*, 7 ARIZ. REV. STAT. (1956) § 20-1114 (any materials of insurer including charter and by-laws); 43 CAL. ANNO. CODE (1955) § 10320 (g) (all materials excepting matters like rate tables or classification charts).

allow a reference but require attachment of the reference materials to the policy.⁷²

Retail installment sales legislation also regulates disclosure of contract terms by requiring a copy of a sales contract to be delivered to the buyer at the time of its execution.⁷³ Along with prohibiting various provisions in these agreements and requiring the use of large type and the insertion of enumerated clauses, it is provided that the contracts must contain all the agreements of the parties with respect to the transaction.⁷⁴

Statutes which attempt to advance the disclosure of contract terms by preventing any incorporation seem unnecessarily harsh, and they have been liberalized by court construction.⁷⁵ Prohibition of all incorporation would place lengthy conditions involving many particulars in the body of the contract, carrying with it the danger of diverting attention from essential provisions. Also, such a limitation would place restrictions upon the types of contracts the parties could enter into.⁷⁶ On the other hand, a rule merely requiring attachment does aid in effecting a disclosure of the full contents of the contract.⁷⁷

2. *Inadequate Disclosure*

In the absence of a statute or common law precedent requiring an attachment, how should a court handle a situation where it believes there has been an inadequate disclosure? Unquestionably it can and will rigidly enforce the requirement of an intent to incorporate and insist upon a showing that the disputed materials were incorporated for the purposes alleged.⁷⁸ Where exact drafting has made such an approach specious, however, the court must resort to other rationales.

⁷² *E.g.*, 17 GA. CODE ANN. (1933) § 56-811; 27 MCKINNEY'S CONS. LAWS OF N.Y. ANN. (1949) § 142.

⁷³ Note, *Retail Installment Sales Legislation*, 58 Col. L. Rev. 854, 867 (1958). See 19 Rocky Mt. L. Rev. 135 (1947).

⁷⁴ See *e.g.*, 7 MD. CODE (1957) Art. 83, § 137(a); 11 IND. ANN. STAT. (1951) § 58-902.

⁷⁵ *Eastern R. Co. v. Relief Ins. Co.*, 98 Mass. 420 (1868) (insurance statute). Accord: *Mullaney v. National F. & M. Ins. Co.*, 118 Mass. 393 (1875); *Porter v. United States L. Ins. Co.*, 160 Mass. 183, 35 N.E. 678 (1893). See *Newman v. Keys*, 12 D. & C. 2d 705 (Pa. 1957) (installment sales contract does not "contain all agreements" because no reference is made to judgment note).

⁷⁶ See 7 MD. CODE (1957) Art. 83, § 137(a) (special provision for allowing incorporation where an "add-on" installment sales contract is desired); 40 MCKINNEY'S CONS. LAWS OF N.Y. ANN. (Supp. 1960) § 402(7). See text at note 31, *supra*.

⁷⁷ But see text at note 91, *infra*.

⁷⁸ See text at note 44, *supra*, and note 86, *infra*.

In *Carroll Const. Co. v. Smith*,⁷⁹ plaintiff construction company instituted an action against defendant, a plumber, who had been hired as a sub-contractor on a school house project. Defendant looked over the job, talked to the foreman, and viewed the plans in the foreman's possession. He then submitted a bid to do the plumbing and heating according to "spc.," which was accepted by the company. Although he never saw the written specifications until he had completed a portion of the work, the defendant at that time was informed that under the terms of the specifications he was expected to furnish the material for the heating plant. There had been no previous discussion concerning materials to be used in connection with that portion of the installation, and his bid was under what a reasonable bid would have been if defendant had contemplated providing heating materials; but he had agreed in writing to perform in accordance with the specifications.

The Supreme Court of Washington held that evidence concerning the circumstances under which the contract between the parties was entered into was admissible and approved the finding of the trial court "that there was no meeting of minds or contract either oral or in writing between the parties hereto in regard to the heating job on said school."⁸⁰ The dissent found no ambiguity in the written contract, and said since defendant admitted delivering a bid for work to be done according to the "spc." he should be held to his contract. It alleged that the majority of the court was ignoring the plain, unambiguous language of the instrument and wrongfully resorting to parol evidence to vary the terms of the agreement.⁸¹

In *Weiner v. Mercury Artists Corp.*,⁸² plaintiff sued defendant for breach of an agreement to supply an orchestra. Defendant, asserting an agreement to arbitrate, moved to stay all proceedings in the action pending an arbitration. The contract between the parties was a one page standard form without any mention or reference to an agreement to arbitrate, but it did contain a clause incorporating "the rules, laws and regulations of the American Federation of Musicians, and the rules, laws and regulations of the local in whose jurisdiction the musicians perform" and made them a part of the contract. Plaintiff, who was not in the music business, did not see these rules nor was he made

⁷⁹ 37 Wash. 2d 322, 223 P. 2d 606 (1950).

⁸⁰ *Id.*, 610.

⁸¹ *Id.*, 613.

⁸² 284 App. Div. 108, 130 N.Y.S. 2d 570 (1954).

aware of any of their contents. They consisted of 207 pages of printed matter in which, somewhere between pages 62 and 66, there was a lengthy provision for arbitration to be handled by the Executive Board of the Federation.

The New York Appellate Division, First Department, denied plaintiff the right to arbitration. It followed a clear trend in New York toward requiring a specific mention of arbitration within the body of the agreement.⁸³ This makes a mere referral to an instrument containing an arbitration provision ineffective since "[t]he intent must be clear to render arbitration the exclusive remedy; parties are not to be led into arbitration unwittingly through subtleties."⁸⁴ The requirements for application of this strict doctrine in arbitration cases are by no means clear but courts employing it have emphasized: the lack of an expectation that a provision calling for arbitration would be likely to be within the incorporated materials;⁸⁵ the length of the extrinsic documents referred to;⁸⁶ the fact that the party suing to avoid arbitration was not a member of the association whose rules they had incorporated and that he had never seen the incorporated materials which had not been attached to the contract;⁸⁷ the fact that the

⁸³ See *American Rail & Steel Co. v. India Supply Mission*, 308 N.Y. 577, 127 N.E. 2d 562 (1955); *Albrecht Chemical Co. v. Anderson Trading Corp.*, 298 N.Y. 437, 84 N.E. 2d 625 (1954).

⁸⁴ *Riverdale Fabrics v. Tillinghast-Stiles Co.*, 306 N.Y. 288, 118 N.E. 2d 104, 106 (1954) (3 justices dissenting), noted 39 Minn. L. Rev. 311 (1955), 29 St. Johns L. Rev. 135 (1955). Cf. *Pacific Vegetable Oil Corp. v. C.S.T. Ltd.*, 29 Cal. 2d 288, 174 P. 2d 441 (1946).

⁸⁵ See *Re General Silk Importing Co.*, 200 App. Div. 786, 194 N.Y.S. 15 (1922) *aff'd.* without opinion 234 N.Y. 513, 138 N.E. 427 (1922). Accord: *Re Bachman, E. & Co.*, 204 App. Div. 282, 187 N.Y.S. 879 (1923).

⁸⁶ *Weiner v. Mercury Artists Corp.*, 284 App. Div. 108, 130 N.Y.S. 2d 570 (1954); *Northridge Corp. Sec. No. 1 v. 32nd Ave. Const. Corp.*, 139 N.Y.S. 2d 37 (Sup. Ct. 1955). Cf. *Dorf v. Taya*, 194 App. Div. 894, 192 N.Y.S. 923 (1920), *aff'd.* 234 N.Y. 525, 138 N.E. 432 (1920) (bill of lading providing it "shall be governed by the law of the flag of the vessel carrying the goods" did not incorporate statute of limitations of Spain although the carrying ship flew Spanish flag).

⁸⁷ *Western Vegetable Oil Co. v. Southern Cotton Oil Co.*, 141 F. 2d 235 (9th Cir. 1944). In *Re General Silk Importing Co.*, the court found that respondent was not a member of the Raw Silk Association of America and refused to require him to proceed to arbitration under a contract which was to be governed "by raw silk rules" adopted by the Silk Association. Subsequently it appeared that both parties had been members of the Association and respondent was expelled from the organization for refusing to participate in arbitration. See *Gerseta Corp. v. Silk Assoc. of America*, 200 App. Div. 890, 192 N.Y.S. 370 (1922), *app. dismissed* without opinion, 233 N.Y. 544, 135 N.E. 911 (1922), where a peremptory mandamus directing reinstatement of Gerseta Corporation to membership in the Association was reversed, two members of the court holding that a factual question was presented on whether it was generally known in the trade that contracts such as were involved in this case required arbitration. Finally, in *Re General Silk Importing Co.*,

arbitration was not to be carried on by an independent agency;⁸⁸ and the fact that the form of the incorporation tended to hide the idea that arbitration was being adopted.⁸⁹

Under the circumstances faced in the two cases recited above, the courts appear to have reached just results by invalidating the incorporation, but it may be suggested that the theories utilized in their decisions were not wholly satisfactory. In the first case there was merit to the dissent's argument that parol evidence was being used to contradict the terms of an unambiguous written contract. In the second case the court tended to restrict its

200 App. Div. 786, 194 N.Y.S. 15 (1922), *aff'd.* without opinion 234 N.Y. 513, 138 N.E. 427 (1922), the Appellate Division reversed an order of the trial court requiring arbitration since while the parties were members of the Association neither was a member of the raw silk division which was the only division for which arbitration was compulsory. See also *McConnell & Reed v. Smith*, [1911] S.C. 635, noted 48 *Scot. L. R.* 564, 1 *Scot. Lt.* 33 (clause in sales note that all disputes are to be governed by Glasgow Flour Trade Association did not adopt provisions for arbitration where buyer was not a member of the Association and had not received reasonable notice of the provision). *Of.* *Scott's Valley Fruit Exchange v. Growers Refrigeration Co.*, 81 Cal. App. 2d 492, 184 P. 2d 183 (1947) (limitation of liability in warehouse receipt). But see *Level Export Corp. v. Wolz, Aiken & Co.*, 305 N.Y. 82, 111 N.E. 218 (1953), *rev'g.* 200 App. Div. 211, 112 N.Y.S. 2d 549 (1952) (dissent by Desmond J., concurred in by Fuld, J.) (Buyer, who was never informed that the provisions of the contract required arbitration and who was not a member of any textile association, failed by his own ignorance to understand the significance of the contract clause which incorporated the "Standard Cotton Textile Salesnote."); *Wilson & Co. v. Fremont Cake & Meal Co.*, 77 F. Supp. 364 (Neb. 1948) (Contract executed by broker for both parties contained the notation "Rules National Soybean Processors Association," which rules provided for arbitration under the rules of the American Arbitration Association. Plaintiff was not a member of the Processor's Association.)

⁸⁸ *Weiner v. Mercury Artists Corp.*, 284 App. Div. 108, 130 N.Y.S. 2d 570 (1954).

⁸⁹ *Riverdale Fabrics Corp v. Tillinghast Stiles Co.*, 306 N.Y. 288, 118 N.E. 2d 104, 41 A.L.R. 2d 867 (1954), *rev'g.* 281 App. Div. 983, 121 N.Y.S. 2d 261 (1953) (words used appeared designed to avoid any resistance that might arise if arbitration were brought to the attention of the party). In *Western Vegetable Oil Co. v. Southern Cotton Oil Co.*, 141 F. 2d 235 (9th Cir. 1944), the part of a form contract which specifically referred to arbitration had been deleted from the contract. The Court found that the deletion was presumptive evidence of an intention to abrogate the arbitration provision from the contract.

A favorite notation made by courts which do not hold parties to incorporated arbitration clauses is that if both parties had actually intended to provide for arbitration they merely had to add a statement to that effect into the contract. See *Re General Silk Importing Co.*, 198 App. Div. 16, 189 N.Y.S. 391 (1921). This argument was countered in *Wilson & Co. v. Fremont Cake & Meal Co.*, 77 F. Supp. 364, 373 (Neb. 1948), where the court termed that position utterly untenable ("If any of the rules were *not* to be operative their omission ought, indeed, to have been expressly incorporated into the memorandum by appropriate language. But having adopted by adequate descriptive language the entire group of rules, the addition of such a phrase as, 'and we intend to include Rule 115,' would appear to be the ultimate in supererogation.").

reasoning to the situation where the incorporated provision contains an arbitration clause. It followed other courts which have treated arbitration as a unique problem around which a group of special rules should be developed.⁹⁰ There is no real difference between a contract incorporating reference material which includes an arbitration provision, or a provision for a short statute of limitations, or a requirement of written notice to be given within a stated time as a condition precedent for suit. In each case a party may be unaware of material restrictions contained within the incorporated provisions, yet he may be held to them because he has signed a contract. Any reasoning employed to avoid this result in cases where its application would be unjust should have widespread use. What rule, then, should be applied where a party claims he has not seen, read, nor expected the material clauses contained in the provisions which were incorporated in the contract?

One way to avoid the problem of a party's not seeing an incorporation would be to adopt universally the requirement of attachment of all incorporated matter to the body of the contract.⁹¹ Such a rule would place a heavy burden on the party preparing the contract and nullify major advantages of the incorporation doctrine. Also, it would probably not effect a substantial increase in the knowledge of incorporated materials, for a layman is still unlikely to wade through a bulky reference even if it is at his disposal. To require a summary of the matters incorporated to appear in the body of the contract might be a more effective solution, for it is the awareness of the contents of the incorporated provisions rather than the

⁹⁰ In *Level Export Corp. v. Wolz, Aiken & Co.*, 280 App. Div. 211, 112 N.Y.S. 2d 549, 551 (1952), the Appellate Division of New York emphasized the difference between an incorporated provision for arbitration, which abridged the fundamental right to a judicial determination, and other provisions of "lesser moment."

The N. Y. Arbitration Act, CIVIL PRACTICE ACT § 1449, CLEVENGER'S PRACTICE MANUAL (1960), does require a contract to arbitrate a future dispute to be in writing. But the special treatment of arbitration cases does not seem to follow solely from this mandate, or from any jealousy which the courts might have towards a competing system of settling disputes. A more likely reason for this separate approach is that because of the specialized nature of the arbitration contract, arbitration precedents are only considered, although an incorporation issue is presented.

⁹¹ See *Emerson Radio and Phonograph Corp. v. Illustrated Products Corp.*, 178 N.Y.S. 2d 277 (Sup. Ct. 1958) ("A provision for arbitration may not be . . . incorporated by reference to an extrinsic document which is neither exhibited nor attached to the contract itself") (*dictum*). Cf. *Charles S. Fields, Inc. v. American Hydrotherm Corp.*, 5 App. Div. 647, 174 N.Y.S. 2d 184 (1958).

actual view of them which is important.⁹² Such a requirement, however, would be likely to lead to stereotyped vague recitals which would involve the parties in litigation over the adequacy of the clause's coverage. It would also place an added strain on the draftsman and prescribe a rigid rule of law in an area where each case should receive individual consideration.

It is surprising that where courts find that a party should be relieved from an unseen and unexpected incorporated provision, they do not unanimously turn to the exceptions to the general contract rule that a person is bound by what he signs regardless of whether he has read it, and extend and strengthen their application in the incorporation situation. Traditionally, if a party erred in thinking he knew the contents of the writing he signed, he has made a unilateral mistake. If the other party had reason to know of this error and did not make him aware of the true state of facts, he cannot hold him to the contract. And a party alleging a mistake can produce parol evidence, not to contradict the terms of the written contract, but to show that the person he contracted with knowingly took advantage of his mistake.⁹³ Also, if a party signing an instrument without reading it was induced to do so by the misrepresentations of the other party to the contract, the contract is voidable by the mistaken party.⁹⁴ Would it be too radical to say that if a person drafts a contract and includes a general reference to materials he has not attached or explained, he represents by his silence that the incorporated matter contains nothing which would not be reasonably expected by the other party?

CONCLUSION

Commercial contracts are complicated and complex, and in drafting an agreement there is a tendency to use a handy form. The longer an instrument the more likely an incorporation becomes.

Almost all the litigation involving incorporation is the result of bad draftmanship. The law relating to incorpo-

⁹² *Of. Allen v. Biltmore Tissue Corp.*, 2 N.Y. 2d 534, 161 N.Y.S. 2d 418, 141 N.E. 2d 812 (1957) (notice of incorporation of restriction on stock transfer upheld).

⁹³ 3 CORBIN, CONTRACTS (1960) §§ 607, 610, pp. 662-63, 692-97. Compare *C.N. Monroe Mfg. Co. v. United States*, 143 F. Supp. 449 (Mich. 1956), with *Carrol Const. Co. v. Smith*, 37 Wash. 2d 322, 223 P. 2d 606 (1950).

⁹⁴ 3 CORBIN, CONTRACTS (1960) § 607, 666-68. See, e.g., *Mutual Savings Life Ins. Co. v. Hines*, 96 Ga. App. 442, 100 S.E. 2d 466 (1957); *Rood v. Midwest Matrix Mart.*, 350 Mich. 559, 87 N.W. 2d 186 (1957).

ration requires an intent to incorporate, and the courts will not hesitate to strictly apply this requirement to prevent one of the parties from making use of the doctrine to gain an unfair advantage.

The problems of manifestation of intent and adequacy of disclosure are interrelated. In the absence of a special circumstance which may require an attachment of incorporated material, a clear manifestation of intent as to what is being incorporated will go far in meeting the need for disclosure. Similarly, adequate disclosure of incorporated terms should greatly influence a court towards a finding of an intent to incorporate where the language used is ambiguous. If the standards for manifesting an intent to incorporate or adequate disclosure are not met, the fact that they were unwittingly unfulfilled by a careless draftsman will not vary a finding of no incorporation unless a court will bend to find the true intent of the party by implication. A good draftsman will never place this burden on the courts. He will in advance draft out the problems that could arise from his incorporation by making his intent to incorporate clear, detailing the scope and purpose of his incorporation, checking the need for attachment of the incorporated material, searching out and avoiding any conflicts with provisions of the main contract, and clearly communicating the substance of the reference material to the other party to the contract.